Maggie Taissya Olyvia v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–7–01 OF 2012 (IDN)
APANDI ALI FCJ, DAVID WONG AND HAMID SULTAN JJCA
13 DECEMBER 2013

Criminal Procedure — Appeal — Conviction and sentence, against — Appellant charged with trafficking in dangerous drugs — Whether trial judge erred by relying solely on weight of drugs seized to infer trafficking — Identity of drug exhibits — Whether drug exhibits produced at trial were same exhibits seized from appellant — Whether difference in weight created reasonable doubt as to identity of drug exhibits — Whether conviction unsafe — Whether appellate intervention warranted

On 20 September 2010, the appellant was arrested in an ambush laid by a police team at the CIQ Complex Bukit Kayu Hitam, Kedah. The bag the appellant was carrying was searched and found to contain 841.63g of dangerous drugs. The appellant was charged with drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In her defence the appellant had claimed that although she had agreed to carry drugs, she had not known the nature of the drugs she was carrying. The trial judge found that the appellant had failed to raise a reasonable doubt in the case against and consequently convicted her of the offence as charged and sentenced her to death. This was the appellant's appeal against her conviction and sentence. In this appeal the appellant contended, inter alia, that it was erroneous for the trial judge to solely rely on the weight of the drugs seized to infer trafficking. According to the appellant material discrepancy in the weight of the drug exhibits and the failure to explain the discrepancy had created a doubt as to the identity of the drug exhibits. As such the appellant claimed that the prosecution had not proved its case beyond reasonable doubt.

Held, dismissing the appeal:

(1) In the instant case, there was no challenge to the drugs or exhibits or break in the chain of evidence during the trial. Pure reliance on discrepancies of weight at the appellate stage could not be a basis in law or jurisprudence to seek an acquittal, particularly in drug cases. A person is said to be trafficking in dangerous drugs if s 2 of the DDA is established. However, the weight of the drugs seized would become a criteria in a case where s 37(da) of the DDA was relied on. In the instant case, the trial judge had relied on ss 2 and 37(d) of the DDA to drive home the charge of trafficking. In any case, it is settled law that minor discrepancies in

weight, which did not comprise the statutory weight for conviction, would not be material. As such, the difference in weight and failure to explain could not stand as a sole ground for acquittal against the weight of authorities in respect of the jurisprudence relating to the break in the chain of evidence (see paras 7–10).

(2) Further, in the instant case, the appellant was caught red handed and was not able to rebut trafficking on the balance of probabilities (see para 10).

(3) There was sufficient material to support the charge and the view taken by the trial court on the relevant issues was a reasonable view of the evidence on record. In the circumstances, it was clear that the court had followed *Radhi*'s direction, and rightly applied the maximum evaluation and the beyond reasonable doubt test. As such, the decision was safe and did not warrant appellate intervention (see paras 11–12).

[Bahasa Malaysia summary

Pada 20 September 2010, perayu telah ditangkap dalam serbuan yang diadakan oleh pasukan polis di Kompleks CIQ Bukit Kayu Kitam, Kedah. Beg yang dibawa oleh perayu telah diperiksa dan didapati mengandungi dadah berbahaya seberat 841.63g. Perayu telah dituduh pengedar dadah di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaannya perayu telah mendakwa bahawa meskipun dia telah bersetuju untuk membawa dadah tersebut, dia tidak mengetahui sifat dadah yang dibawanya itu. Hakim perbicaraan mendapati bahawa perayu telah gagal untuk menimbulkan keraguan munasabah dalam kes terhadapnya dan berikutan itu dia disabitkan kesalahan sebagaimana dituduh dan dihukum mati. Ini adalah rayuan perayu terhadap sabitan dan hukumannya. Dalam rayuan ini perayu berhujah, antara lain, bahawa hakim perbicaraan terkhilaf kerana bergantung semata-mata pada berat dadah yang dirampas untuk membuat kesimpulan wujud pengedaran. Menurut perayu pertikaian material dalam berat ekshibit-ekshibit dadah dan kegagalan untuk menjelaskan pertikaian itu telah menimbulkan keraguan tentang identiti ekshibit-ekshibit dadah itu. Oleh itu perayu mendakwa bahawa pendakwaan tidak dapat membuktikan kesnya melampaui keraguan munasabah.

Diputuskan, menolak rayuan:

(1) Dalam kes ini, tiada cabaan terhadap dadah itu atau ekshibit-ekshibit atau rantaian keterangan yang terputus semasa perbicaraan. Kebergantungan semata-mata pada pertikaian berat di peringkat rayuan tidak boleh menjadi asas dari segi undang-undang atau jurisprudens untuk memohon pelepasan, khususnya dalam kes-kes dadah. Seseorang dikatakan mengedar dadah berbahaya jika s 2 ADB telah dibuktikan. Walaubagaimanapun, berat dadah yang dirampas akan menjadi criteria dalam kes di mana s 37(da) ADB digunakan. Dalam ke sini, hakim

perbicaraan bergantung kepada ss 2 dan 37(d) ADB untuk membuat pertuduhan pengedaran. Dalam apa keadaan, adalah undang-undang tetap bahawa pertikaian sedikit dari segi berat, yang tidak termasuk berat statutori untuk sabitan, tidak menjadi material. Oleh itu, pertikaian dari segi berat dan kegagalan untuk memberi penjelasan tidak boleh dikekalkan sebagai satu-satunya alasan untuk pelepasan terhadap beban autoriti berkenaan jurisprudens berkaitan rantaian keterangan yang terputus (lihat perenggan 7–10).

(2) Selanjutnya, dalam kes ini, perayu telah ditangkap semasa melakukan kesalahan itu dan tidak dapat mematahkan tuduhan pengedaran itu atas imbangan kebarangkalian (lihat perenggan 10).

(3) Terdapat bahan mencukupi untuk menyokong pertuduhan itu dan pendapat yang diambil oleh mahkamah perbicaraan berhubung isu-isu berkaitan adalah pendapat munasabah mengenai keterangan atas rekod. Dalam keadaan itu, adalah jelas bahawa mahkamah telah mengikuti arahan kes *Radhi*, dan telah melaksanakan penilaian maksimum dan ujian melampaui keraguan munasabah yang sewajarnya. Oleh demikian, keputusan itu adalah selamat dan tidak memerlukan campur tangan mahkamah rayuan (lihat perenggan 11–12).]

Notes

For cases on conviction and sentences against, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 324–370.

Cases referred to

Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Natcha Dabkaew v PP (K-05–177–07 of 2012), CA (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
Tay Chung Chaw & Anor v PP and another appeal [2014] 2 MLJ 671, CA (refd)
Tong Kam Yew & Anor v PP [2013]4 MLJ 888, CA (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), (2)

Appeal from: Criminal Trial No 45A-25 of 2011 (High Court, Alor Setar)

S Selvi (Gooi & Azura) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney Generals Chambers) for the respondent.

Hamid Sultan JCA (delivering the judgment of the court):

[1] The appellant's appeal in respect of conviction and sentence of death for trafficking in dangerous drugs came up for hearing on 28 March 2013; 28 August 2013; and 10 October 2013 and upon hearing we dismissed the appeal. My learned brothers Mohamed Apandi bin Haji Ali FCJ and David Wong Dak Wah JCA have read the draft judgment and approved the same. This is our judgment.

[2] The appellant was charged for trafficking of dangerous drugs. The charge reads as follows:

> Bahawa kamu pada 20 September 2010, jam lebih kurang 12.15 tengahari di Kompleks CIQ Bukit Kayu Hitam, dalam Daerah Kubang Pasu, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu dadah sejumlah berat 841.63 gram (656.15 gram heroin dan 185.48 gram monoacetylmorphines). Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Akta yang sama.

BRIEF FACTS

[3] The police had information of drug activities at CIQ Complex Bukit Kayu Hitam. The appellant was seen pulling a bag and passing the Immigration counter. She proceeded to the scanning machine and after it was scanned she took the bag and subsequently the police team headed by PW3 arrested her. Eventually, the bag was searched and drugs were found.

[4] The petition of appeal, inter alia, reads as follows:

(a) the prosecution had failed to mention in its opening statement, whether the evidence against the appellant was by way of direct evidence or statutory presumption;

(b) there was difference in weight;

(c) the appellant was arrested based on information to the police, thus there might raise element of frame;

(d) the appellant co-operated with the police when arrested;

(e) the learned Judge erred by deciding that presumption of possession and knowledge under s 37(d) of the DDA 1952 was applicable, and that the prosecution had proven trafficking under s 2 of the DDA 1952.

(f) The learned Judge erred by accepting the appellant's caution statement as a confession without looking into the voluntariness or motive.

[5] The learned counsel for the appellant informed us that there are only two issues which the appellant is going to canvass on the appeal. They are as follows:

(a) doubt as to identity of drugs; and

(b) gross incompetence of assigned counsel.

[6] The learned counsel's skeletal submission on this issue reads as follows:

> 1. Doubt as to the identity of the drugs which formed the subject matter of the charge.
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> It is submitted that the drugs in question was not the drugs seized due to difference in the weight. The gross weight of the envelope and its contents marked B1 as found by PW3, the raiding officer and PW5, the investigating officer was 1720 grammes (Refer: Record of Appeal pages 34 & 57) whilst PW2, the chemist said it was 1667.20 grammes (Refer: Record of Appeal page 10).
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> The gross weight of the envelopes marks B2 and B3 and its contents as found by the investigating officer was 1kg each. PW2 the chemist said the gross weight of the envelope marked B2 and its contents was 1007 gram and the envelope marked B3 and its contents was 1020.10 grammes. The chemist confirmed that only the envelope marked B1 contained dangerous drugs.
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> The total difference in the weight of the drug exhibits of 52.8 grammes is a material discrepancy. No reason had been given by any of the prosecution witnesses as to the difference in the weight. In the circumstances it has created a doubt as to the identity of the exhibits and for this reason it cannot be said that the prosecution has proved its case beyond reasonable doubt.
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> (Refer: 1) *Zaifull bin Muhammad v Public Prosecutor* (In The Federal Court of Malaysia, Criminal Appeal No 05–197–2011); [2013] 2 MLJ 348; [2013] 2 CLJ 383
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> 2) *Yusri Pialmi v Public Prosecutor* [2010] 3 MLJ 445; [2010] 6 CLJ 878
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> 3) *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212
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> 4) *Yeong Kia Heng v Public Prosecutor* [1992] 1 MLJ 327; [1992] 1 CLJ (Rep) 372)
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> 2. The incompetence of counsel has compromised the fairness of the trial thus rendering the conviction as unsafe.
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> Perusing the notes of evidence, it is apparent that the defence taken by the assigned counsel is one of admission that the Appellant was carrying drugs, had agreed to carry drugs but did not know the nature of the drugs she was carrying.
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> The approach taken was preposterous. Any right minded counsel would not have taken such an approach. The flagrant incompetence of the counsel has caused a miscarriage of justice.
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> (Refer: *Shahmim Reza Abdul Samad v Public Prosecutor* [2009] 6 CLJ 93).

[7] In the instant case, the learned trial judge in his 13 pages judgment had meticulously dealt with the facts, evidence and law. What is important to note is that there was no challenge to the drugs or exhibits or break in chain of evidence during the trial (see *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636). Pure reliance on discrepancies of weight at appellate stage cannot be a basis in law or jurisprudence to seek an acquittal, more so in drug cases. Weight per se is not an element of the offence for conviction. That is to say when the courts deal with the issue of trafficking of drugs, the weight is not the criteria as long as it is established that the appellant was carrying prohibited drugs. A person is said to be trafficking if s 2 of the Dangerous Drugs Act 1952 (DDA 1952) criteria is established. However, when s 37(da) is relied on the weight becomes a criteria to attract the section. In the instant case, the learned trial judge had relied on ss 2 and 37(d) to drive home the charge of trafficking. In *Tay Chung Chaw & Anor v Public Prosecutor and another appeal* [2013] MLJU 1297 (W-05–64–03 of 2012 and W-05–65–03 of 2012) through Hamid Sultan bin Abu Backer JCA made the following observation:

> On the issue of 'difference in weight' of drugs, we must say that methodologically and/or jurisprudentially it cannot be taken for the first time at the appellate stage, (see *Natcha Dabkaew v PP* (K-05-177-07-2012)). This is so inter alia for two reasons. One under s 2 of the DDA 1952 weight of drugs is not an element to sustain a charge of trafficking. Secondly, it is well established once the defence for trafficking is called the legal burden to rebut trafficking on the balance of probabilities falls on the accused. This proposition is consistent with a number of case laws as well (see *Phrueksa Taemchin v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338; *Munuswamy Sundar Raj v Public Prosecutor* [2013] 5 MLJ 48; *Phiri Mailesi v Public Prosecutor* [2013] 5 MLJ 780).

[8] In the case of *Natcha Dabkaew v Public Prosecutor* (K-05–177–07 of 2012), the Court of Appeal had dealt with the case of *Zaifull* and *Hasbala* which relates to discrepancies in weight. Minor discrepancies in weight which do not compromise the statutory weight for conviction will not be material and also the issues relating to break in chain of evidence and the underlying jurisprudence.

[9] The Court of Appeal through Hamid Sultan bin Abu Backer JCA, on the facts of the case made the following observations:

> Weight
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> [8] Learned counsel for the Appellant says that SP6 and SP7 who had weighed the packets had stated that it was 18.956 kg and 18.9 kg respectively. The chemist SP2 had stated that it was 19197.70 grams and complains that the difference in weight was never explained and relies on the case of *Yeong Kian Heng v Public Prosecutor* [1992] 1 CLJ 364 where the Court quashed the conviction and sentence when the error in weight of the drugs was only 10 grams.

A [9] The learned Deputy Public Prosecutor vehemently object to the contention of the Appellant that there was a break in the chain of evidence and failure to explain the discrepancies entitles the Appellant to seek an acquittal. And asserts in the instant case the drugs' markings and weight were made in the appellant's presence and the Appellant had signed the exhibit. In addition says that the case of *Zaifull bin Muhammad v Public Prosecutor & another appeal* [2013] 2 MLJ 348 can be B distinguished. In the case of *Hasbala Mohd Sarong v PP* [Federal Court Appeal No 05–87–05 of 2012 (B)] the Federal Court held that the question whether there was a break in the chain of exhibits giving rise to the issue of identity of the drug exhibit is a question of fact and depend on the facts and circumstances of the case.

C [10] In our view, both *Zaifull* and *Hasbala* (above) are good authorities and must be followed depending on the facts of the case. In any event, *Zaifull*'s case did not attempt to introduce a new jurisprudence that the moment there is a discrepancy in weight and has not been explained the accused is entitled to an acquittal. Such a proposition did not find favour even before the Singapore Court of Appeal in the case of *Lim Swee Seng v Public Prosecutor* [1995] 1 SLR 425 where the majority had D rejected the argument that unexplained discrepancies in weight entitles an acquittal. The prudent test expounded in that case is that in cases where there is an allegation of break in the chain of evidence, the issue for the Court's determination was whether, on the evidence adduced before the Court, any doubt had been raised on the identity of the drug exhibits, (see *Satli bin Masot v Public Prosecutor* [1999] 2 E SLR 637). *Zaifull* and *Hasbala* had correctly applied the prudent test advocated in the Singapore case though it may not have been expressed in those words. Any proposition by the appellant to assert that difference in weight and failure to explain can stand as a sole ground for an acquittal must be struck down as it would be against the weight of authorities in respect of the jurisprudence relating to break in chain of evidence and apex court rarely trend into the path of legislators.

F [11] In *Zaifull*'s case, the appeal was not just allowed on the sole ground of discrepancy as to the weight of the drugs which was not explained but also the fact that there was discrepancy in the number of 'ketulan or slab'. The Federal Court at paragraph 32 had this to say:

G [32] We are of the view that in present case, there exist material discrepancies in the gross weight of the cannabis mentioned in the original charge compared to the evidence of PW2. Other than that, there also exist material discrepancy in the number of 'ketulan' mentioned in the original charge compared to the number of 'ketulan' as testified by PW4, PW8 and PW2. The gross weight and the number of 'ketulan' of the drug exhibit certainly go to the identity of the drug exhibit. How else H can the identity of the drug exhibit be established. Therefore, any serious discrepancies on the gross weight and the number of 'ketulan', unless satisfactorily explained, in our view will go the question of identity of the drug exhibit.

And at para 35, His Lordship Ariffin bin Zakaria, CJ made a pertinent observation I and conclusion consistent with the jurisprudence relating to identity of drugs and break in the chain of evidence. The learned Chief Justice had this to say:

[35] With respect, we could not agree with the prosecution on this issue. We are of the view that, *in the circumstance of this case*, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left

unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case, (Emphasis added.)

[12] It must be asserted that the issue of identity of the exhibits is one of finding of facts. Being a question of fact as a general rule, failure to challenge may be fatal. The challenge must be to the exhibit per se and not just as to the weight alone. When it relates to exhibit it is the duty of the prosecution to demonstrate to the Court the full history of that exhibit from the time it first came into police custody until it is produced in Court. In *Lee It Leo v K* [1954] 20 MLJ 215 the Court stated that:

> the second ground of appeal was that it was not conclusively proved that the Chap Ji Kee schedules produced in Court were the same documents which one of the detectives saw at the time the appellant was apprehended and which were alleged to have been dropped by the appellant. The evidence for the Crown was certainly deficient in that it did not give the history of these documents from the time the detectives took possession of them up to the time of their production in Court, and in some cases this omission might have proved a fatal defect, but in the present case I do not think there is any ground to suspect the documents had been altered in any way while in Police custody, and accordingly I do not think any question of a miscarriage of justice arises in this instance. Prosecuting officers must bear in mind the importance in all cases of leading evidence as to the full history of exhibits, documentary or otherwise, from the time they first came into Police custody until they are produced in Court.

[13] Once the Court is satisfied as to the exhibit and the nexus to the case, the fact that the exhibit was not in the original shape or condition or weight has less significant probative weight unless it creates reasonable doubt in the mind of the trial judge that the exhibit has no nexus to the case. Even if an exhibit has been lost or destroyed does not mean the prosecution's case will collapse. It all depends on the facts. It may be in drug cases. However, if the Chemist report has been secured before the loss or damage it may not be necessarily so. It all depends on the facts and the central issue will relate to credibility of witnesses and not the exhibits perse.

[10] In the instant case, we do not find any merits on the issue of weight or on the issue of incompetent counsel. We have also gone through the appeal record, the judgment and the petition of appeal even though learned counsel for the appellant had limited to two issues only. We do not find any merits in the appeal. Further, in the instant case the appellant was caught red-handed and was not able to rebut trafficking on the balance of probabilities.

[11] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view

of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Wang Wee Cheng v Public Prosecutor* [2013]4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[12] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

We hereby order so.

Appeal dismissed.

Reported by Kohila Nesan